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Supreme Court, U.S.
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No. 07-429

In The

Supreme Court of the United States

KATINA KEFALOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it a violation of the Sixth Amendment to the United States Constitution for the District Court (a) without reasonable notice to defendant, (b) without reasonable opportunity for defendant to respond and (c) without providing the defendant with counsel to represent her on the issue of waiver, to determine that the defendant, by her conduct, has waived her right to counsel?

2. Is a proceeding to determine if a defendant has waived her right to counsel by virtue of her conduct a proceeding in which she has a Sixth Amendment right to be represented by counsel?

3. Is it a violation of the Sixth Amendment to the United States Constitution for counsel for the defendant to conspire with the district judge to force the defendant to go to trial *pro se*?

4. Is it a violation of the Sixth Amendment to the United States Constitution for counsel appointed to represent the defendant to fail to provide the District Court with information that the defendant is being uncooperative with her counsel, who is seeking to withdraw, because she is under the control of a third person?

5. If questions 1, 2, 3 and/or 4 are answered in the affirmative, is the effect of the constitutional violation evaluated under *Strickland v. Washington*, 466 U.S. 668 (1984) under which prejudice must be proven or under *United States v. Cronic*, 466 U.S. 648 (1984) under which prejudice is presumed?

QUESTIONS PRESENTED – Continued

6. Could reasonable jurists debate or agree that Kefalos' petition pursuant to 28 U.S.C. § 2255 should have been resolved in a different manner or that the issues presented therein were adequate to deserve encouragement to proceed further and, therefore, required issuance of a certificate of appealability pursuant to *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

All parties to the proceeding in the Court of Appeals, whose judgment is sought to be reviewed, are set forth in the caption of the case.

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OPINIONS

The opinion of the Court of Appeals (A 1-2)[1] denying Kefalos' request for a certificate of appealability, the Opinion and Order of the district court authored by Judge Algernon Marbley dismissing Kefalos' petition pursuant to 28 U.S.C. § 2255 (A 3-10) and the Report and Recommendation of the United States Magistrate that Kefalos' petition pursuant to 28 U.S.C. § 2255 be dismissed (A 11-21) are all unreported.

JURISDICTION

The order of the Court of Appeals denying Kefalos a certificate of appealability under Fed. R. App. P 22(b) was entered on July 3, 2007. (A 1-2) Kefalos did not file a Petition for Rehearing. This Petition for Writ of Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). *Hohn v. United States*, 524 U.S. 236 (1998). The District Court had jurisdiction under 28 U.S.C. § 2255.

[1] The opinions below are reproduced in the appendix to this petition. "A" page references are to the appendix.

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The Sixth amendment to the United States Constitution states:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

An appeal of a decision by the District Court denying a petition pursuant to 28 U.S.C. § 2255 is set forth in 28 U.S.C. § 2253 which provides in relevant part:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> * * *
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from
>
> * * *
>
> (B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Fed. R. App. P. 22(b) provides:

> (1) In a habeas corpus proceeding in which the detention complained of arises from process issued from a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.
>
> (2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

STATEMENT OF THE CASE

On December 4, 2001, the Petitioner, Katina Kefalos ("Kefalos") was convicted in the United States District Court for the Southern District of Ohio of one count of willfully evading the payment of federal taxes in violation of 26 U.S.C. § 7201. The district judge presiding over her trial was Algernon Marbley ("Judge Marbley"). As a result of the events detailed hereafter, Kefalos involuntarily represented herself at the trial.

Kefalos appealed her conviction to the United States Court of Appeals for the Sixth Circuit. She was represented in that appeal by Alan J. Pfeuffer ("Mr. Pfeuffer"), an assistant federal public defender with whom she cooperated once he extracted her from the influence and control of James McBride ("McBride"). McBride's control of Kefalos' conduct during the latter stages of the proceedings leading up to her conviction was and is one of the bases of her petition pursuant to 28 U.S.C. § 2255 and will be discussed in detail hereafter.

After Kefalos' conviction and after she was freed from the control of McBride by Mr. Pfeuffer, she retained the undersigned to represent her in a malpractice action against David Axelrod ("Axelrod"), one of Kefalos' court-appointed counsel, and his firm, Vorys, Sater, Seymour & Pease LLC ("Vorys, Sater"). It was during the course of the malpractice action that Kefalos became aware of the full extent of the collusion between Axelrod and Judge Marbley in forcing her to proceed to trial without counsel.

After becoming aware of the full extent of the collusion between Judge Marbley and Axelrod, Kefalos filed her petition pursuant to 28 U.S.C. § 2255. She did so *pro se*, in large part utilizing a brief and evidentiary materials the undersigned filed in opposition to a motion for summary judgment filed by Axelrod and Vorys, Sater in the malpractice case. The conduct of Judge Marbley and Axelrod was a central focus of the section 2255 petition.

Judge Marbley, despite the mandate of 28 U.S.C. § 455, denied the petition rather than disqualify himself. Section 455 provides that a district judge shall disqualify himself where he has "personal knowledge of the disputed evidentiary facts concerning the proceeding."

When the undersigned learned of the denial of the petition, he undertook the representation of Kefalos on appeal. Though the disqualification issue was raised in the Sixth Circuit, the court ignored it and simply denied the request for certificate of appealability. Is this a situation of jurists protecting their brethren?

While Mr. Pfeuffer raised an issue regarding certain *ex parte* contacts between Axelrod and Judge Marbley, in Kefalos' appeal of her conviction, the Sixth Circuit was not informed in that appeal of matters which occurred during McBride's criminal trial and matters which were learned subsequently in Kefalos' malpractice action against Axelrod and Vorys, Sater. All the Sixth Circuit knew was that

Axelrod had sent *ex parte* memoranda to Chris Glarcs, Judge Marbley's law clerk. These memoranda expressed Axelrod's desire to withdraw and his advice as to the method by which it could be accomplished without the necessity for appointing new counsel for Kefalos by holding she had waived her right to counsel. Axelrod was advising Judge Marbley how to take action adverse to Kefalos, a grievous breach of fiduciary duty. By allowing this misconduct and participating in its implementation, Judge Marbley was equally culpable.

During the course of the proceedings leading up to her conviction, Kefalos was provided a series of five appointed lawyers. Axelrod was the fifth.

The circumstances resulting in the discharge or withdrawal of the first four appointed defense counsel is a subject of dispute. Judge Marbley presented his view during a hearing on Axelrod's motion to withdraw. However, Kefalos was not given a full and fair opportunity to dispute Judge Marbley's contention that the discharge of the four was founded upon a motive to hinder and delay. Kefalos had no opportunity to present a rebuttal to Judge Marbley's recitation, nor was she provided counsel to assist her in doing so. Shortly after holding Kefalos had waived her right to counsel and after granting Axelrod leave to withdraw, Judge Marbley appointed Mr. Pfeuffer as standby counsel. Had he done this before ruling on waiver the result may have been dramatically different.

Axelrod, three minutes prior to the status conference held on November 8, 2001, filed a motion to withdraw which served as Judge Marbley's basis to find that Kefalos, by her conduct with respect to Axelrod, voluntarily waived the right to counsel. He then allowed Axelrod to withdraw. However, Judge Marbley insisted that Axelrod remain as Kefalos' counsel during the proceeding in which he determined that she had waived her right to counsel. Axelrod stood mute during the proceeding. Obviously, he had a conflict of interest, since he desperately wanted to be relieved of his duty to zealously represent Kefalos.

At the time Axelrod made his motion to withdraw he knew the conduct on which the motion was based was caused by McBride.

Subsequent to Kefalos' conviction, McBride was indicted for bankruptcy fraud arising out of conduct he took against Judge Marbley and Axelrod, in retaliation for what they did to Kefalos. During the malpractice case it was learned that the circumstances leading to Kefalos' denial of counsel became an issue in McBride's trial which took place in May, 2002. During that trial both Judge Marbley and Axelrod, who were McBride's victims, testified. On cross-examination by McBride, who was representing himself, Judge Marbley and Axelrod were interrogated with respect to their conduct which forced Kefalos to go to trial without an attorney.

In affirming Kefalos' conviction, the Sixth Circuit did not have the benefit of the testimony of Axelrod and Judge Marbley given during the McBride trial nor did it have knowledge that Kefalos was acting under the control of McBride when she participated in the conduct which led to the ruling that she had waived her right to counsel. All the Sixth Circuit had were the October 25, 2001 and November 6, 2001 memoranda described below. Though they were not part of the proceedings below, they were placed in the record on appeal of Kefalos' conviction by stipulation.

The district court was presented with the following verified facts referenced in affidavits, transcripts of depositions taken in the malpractice case, exhibits discovered in the malpractice case and relevant portions of the transcript of McBride's trial in support of Kefalos' petition pursuant to 28 U.S.C. § 2255:

1. On October 19, 2001, Axelrod made an *ex parte* call to Judge Marbley regarding ethical issues.

2. On October 25, 2001, Thomas H. Fusonie ("Fusonie"), a law clerk to Axelrod, at his direction sent a 21 page fax to Chris Glaros, Judge Marbley's law clerk, which discussed Axelrod's desire to withdraw.

3. On November 5, 2001, Axelrod and Fusonie had an *ex parte* telephone conversation with Chris Glaros.

4. On November 5, 2001, Judge Marbley issued an Order Setting Status Conference for November 8, 2001.

5. On November 6, 2001, Axelrod faxed a seven page memo to Chris Glaros. This memo outlined the steps Judge Marbley was required to follow and the findings he was required to make in order to hold that Kefalos had waived her right to counsel by virtue of her conduct.

6. Under oath in the McBride trial on May 22, 2002, Judge Marbley denied seeing either fax or being informed of the content of either.[2] (McBride Tr., pp. 304-315).

7. Under oath in the McBride trial on May 20, 2002, Axelrod denied any communications with Judge Marbley or his law clerks informing Judge Marbley how to deal with Katina Kefalos to force her to go to trial *pro se*. This testimony was later recanted. (McBride Tr., pp. 173-174; 291).

8. Under oath in the McBride trial, after recanting his May 20, 2002, denial that he sent memos to Judge Marbley, on May 22, 2002, Axelrod went on to admit the *ex parte* transmission of the November 6, 2001 fax to Chris Glaros. (McBride Tr., pp. 282-283).

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[2] Excerpts from the transcript of the trial in **USA v. McBride**, No. CR-2-02-60, United States District Court for the District of Ohio, Eastern Division, were submitted in support of Kefalos' petition for writ of habeas corpus.

9. Under oath in the McBride trial on May 22, 2002, Axelrod testified that Judge Marbley was concerned that, if he allowed Axelrod to withdraw, Kefalos would continue to object to lawyers until Judge Marbley allowed her to have a lawyer of her choosing. (McBride Tr., pp. 292-294). This implies an *ex parte* communication with Judge Marbley in which Judge Marbley expressed the referenced concern.

10. Under oath on in the McBride trial May 22, 2002, Axelrod testified that Judge Marbley would not let him withdraw if it required that new counsel be approved for Kefalos. Axelrod testified he wanted to get out of the case and that is why the ex-parte fax of November 6, 2001, was sent. (McBride Tr., pp. 292-294).

11. Under oath in the McBride trial on May 22, 2002, Judge Marbley denied ever having seen the November 6, 2001, fax and states he does not know if it was received by his clerk, Glaros. (McBride Tr., p. 304).

12. Under oath in the McBride trial on May 22, 2002, Judge Marbley denied ever seeing the October 25, 2001, memo faxed to Glaros. (McBride Tr., p. 307).

13. Under oath in the McBride trial on May 22, 2002, Judge Marbley denied any recollection of Glaros telling him about the two memos. (McBride Tr., p. 308).

14. Under oath in the McBride trial on May 22, 2002, Judge Marbley denied ever seeing either memo. (McBride Tr., p. 315).

15. The truth of Judge Marbley's testimony cannot be tested because United States District Judge Edmund Sargus prohibited taking of the deposition of Chris Glaros in the malpractice action against Axelrod and Vorys, Sater with respect to Judge Marbley's knowledge and use of the memos. Judge Sargus grounded his order on judicial privilege. It would appear that the privilege was waived by Judge Marbley's testimony. An inference that Judge Marbley was not telling the truth can be drawn from the testimony of Charles Waterman, a Vorys, Sater law clerk who read the November 6, 2001 fax. He testified in his deposition in the malpractice case that Judge Marbley appeared to be reading from Fusonie's memo during the November 8, 2002, hearing. (Waterman depo., pp. 16-26).[3]

16. Judge Marbley's denial of his use of Axelrod's memos, in the face of evidence that he did use them, supports an inference that Judge Marbley and Axelrod conspired to force Kefalos to go to trial *pro se*.

17. Axelrod's November 6, 2001, fax set forth steps for Judge Marbley to follow in reaching a conclusion that Kefalos had waived her right to assistance of

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[3] Excerpts from the depositions of Thomas Fusonie, Charles Waterman and David Axelrod were submitted in support of Kefalos' petition for writ of habeas corpus.

counsel as a result of her conduct. In that regard it stated:

> If the a [sic] court confronts an obstreperous defendant, then it might be concluded that the defendant has knowingly and intelligently waive [sic] Sixth Amendment right to assistance of counsel. For the court to reach such a conclusion, it should follow the guidelines stated below. . . .

18. On November 8, 2001, a status conference was held.

19. At 3:57 p.m. on November 8, 2001, Axelrod filed a motion to withdraw. A copy was not served on Kefalos.

20. There was no notice to Kefalos or counsel for the United States that Judge Marbley would consider a motion to withdraw or conduct a proceeding to determine whether Kefalos, by her conduct, had waived her right to counsel at the November 8, 2001, status conference. The timeline clearly indicates that Judge Marbley and Axelrod intended to surprise Kefalos thereby preventing her from taking steps to protect her right to counsel.

21. Before acting on the motion to withdraw, Judge Marbley addressed the question of whether Kefalos, by her conduct, had waived the right to counsel. In doing so, he followed an outline which closely paralleled the outline presented in Axelrod's November 6, 2001, memo.

22. The similarity of Judge Marbley's colloquy at the hearing with the November 6, 2001, memo supports the conclusion that he was following the steps suggested by the memo.

23. Charles Waterman, a Vorys Sater attorney who accompanied Axelrod to the Novemer 8, hearing, reported to his colleague, Fusonie, when he returned from the hearing, that it sounded to him as if Judge Marbley was following Fusonie's memo in determining that Kefalos was not entitled to counsel. (Fusonie depo., pp. 60-61; Waterman depo., pp. 17-25).

24. In the McBride trial on May 20, 2002, Axelrod testified as follows (McBride Tr., pp. 173-174):

> Q. Do you remember having any communication between yourself and Judge Marbley or Judge Marbley's law clerks and informing him how to deal with Katina Kefalos? How to force her to go "pro se"?
>
> A. No, absolutely not.
>
> Q. There was no communication like that?
>
> A. I communicated with Judge Marbley and Judge Marbley's law clerks, as I do in every criminal case, but that was never one of the subjects of our communication. But my intention was to give her the best defense as I possibly could. I thought I had a pretty good defense to be raised in her behalf, and I was prepared to make it. I was prepared to contest the

matter vigorously on her behalf, but she wouldn't let me.

Q. Okay. There was no communication that would have been unethical or criminal between you and Dan Brown and the judge or you and the judge?

A. Absolutely not.

25. Axelrod returned to the witness stand two days later and recanted his testimony saying that he had recalled such a memo, and admitted that a memo had been prepared in his office and submitted to Glaros. (McBride Tr., p. 291). He further testified that since the memo did not address an issue of guilt or innocence, *ex parte* communications with the Court were appropriate. (McBride Tr., p. 283).

26. After McBride was convicted of bankruptcy fraud in May 2, 2000, Axelrod submitted a memo entitled Statement of David F. Axelrod Regarding James Thomas McBride in connection with the sentencing of McBride. This memo was discovered during the course of the malpractice litigation against Axelrod and Vorys, Sater and was not known to Kefalos prior to its discovery in that litigation. In that memo Axelrod states in part:

> I first came into contact with McBride during my representation of Katina Kefalos. I did not know his name at the time, but he was present for most or all court proceedings. During this period, Kefalos was refusing to communicate with me in any substantive

way, to her detriment. Several times, I attempted to speak with her outside the courtroom, and McBride physically interfered by (with another person whom I believe also to be a tax protestor) creating a physical screen between Kefalos and me.

I believe that McBride contributed significantly to the substantial prison sentence received by Kefalos. Kefalos steadfastly refused all my attempts to help her, refusing to speak with me and returning all written communications with the notation "accepted and returned for value and settlement," or words to that effect. *I believe (but do not know) that she was acting at McBride's direction or under his influence.* I understand that on at least one occasion, and perhaps more, McBride answered the door at Kefalos' house when I had documents delivered by messenger. *I also know that he made tax protestor-type statements to me outside Judge Marbley's courtroom that were consistent with my belief that Kefalos acted at his direction.* I believe that, had Kefalos allowed a competent attorney to provide a legitimate defense, there was some possibility of an acquittal, and there was a probability of a much more lenient sentence in the event of conviction. (Emphasis added).

27. Axelrod's belief that Kefalos was acting at McBride's direction or under his influence was not brought to the attention of Judge Marbley by Axelrod

during the course of the November 8, 2001, status conference during which Kefalos was held to have waived her right to counsel by her conduct.

28. Axelrod's credibility is highly suspect and he is not likely to be believed by a trier of fact. In his deposition in the malpractice case, before being asked to authenticate the Statement of David F. Axelrod Regarding James Thomas McBride, he was asked the following questions:

Q. Do you believe that McBride contributed significantly to the substantial prison sentence which Katina Kefalos received?

A. I have no idea.

Q. Did you ever have any idea?

A. No.

Q. Do you believe that Kefalos was acting at McBride's direction or under his influence?

A. I have no idea. For all I know, he was acting at her direction and under her influence.

MR. TONDRE: Mark this as Exhibit 1, please.

A ONE-PAGE DOCUMENT ENTITLED "STATEMENT OF DAVID F. AXELROD REGARDING JAMES THOMAS McBRIDE" WAS MARKED AS AXELROD EXHIBIT 1.

Q. Let me show you Exhibit 1, Mr. Axelrod. Did you prepare that document.

A. Yes.

Exhibit 1, which was authored by Axelrod states:

> I believe that McBride contributed significantly to the substantial prison sentence received by Kefalos.
>
> I believe (but do not know) that she was acting at McBride's direction or under his influence.

29. On August 29, 2001, Kefalos had a one hour telephone conference with Axelrod during which Kefalos discussed the claims against her, her defenses and her expectations. A CD containing the full content of the conversation has been lodged with the Clerk of the District Court. At the conclusion of that conversation, a meeting was set for September 14, 2001, in Axelrod's office. The tone of the telephone conference, as reflected in the recording, indicated clearly that Kefalos wished to pursue the case in a coherent, reasonable and cooperative manner and wanted to work with Axelrod. Axelrod failed to disclose this fact to Judge Marbley at the November 8, 2001, hearing on Kefalos' waiver by conduct. In fact, prior to being confronted with a recording of the conference in the malpractice litigation, Axelrod claimed he had had no conferences with Kefalos which lasted longer than a few minutes and none in which substantive discussions were had.

30. After the August 29, telephone conference, Kefalos sent Axelrod a proposed contract of representation. Axelrod ignored the contract and did nothing to assure Kefalos she would not have the same problems with him she had with prior counsel. Kefalos was certainly being reasonable in asking Axelrod in essence to subscribe to an agreement of loyalty. The four counsel who preceded Axelrod were: (1) Neil Rosenberg, who was allowed to withdraw as a result of a conflict of interest; (2) Dennis Belli, whom Kefalos asked be discharged because he pressured her to make a statement that was not true and admitted that he was unqualified to handle Kefalos' case; (3) Terry Sherman, whom Kefalos asked be discharged because he refused to confer with her with respect to a *Cheek* defense; and (4) Marcia Zand, who requested permission to withdraw because she did not feel competent to handle Kefalos' defense. These facts regarding the four prior defense counsel were not presented to Judge Marbley at the November 8, 2001 hearing but were presented to him in this habeas corpus proceeding.

31. Though the true facts regarding the discharge and withdrawal or the four previous counsel were contrary to those recited by Judge Marbley at the November 8, 2001, hearing, Kefalos was not competent to controvert them at that time, nor given the time to marshal the facts and present them, nor provided with counsel to assist her in the task. Instead Judge Marbley continued to assert that Axelrod, who was

clearly adverse to Kefalos, was her counsel throughout the proceedings on waiver.

32. In September, 2001, after Kefalos met McBride, Kefalos' conduct became irrational. The explanation for this irrational behavior is that McBride took control of Kefalos, a fact of which Axelrod became aware.

33. Axelrod did not inform the Court of this dramatic change in Kefalos' behavior. Instead, he falsely reported to the Court that Kefalos had never been willing to talk to him or work with him.

34. At that point it was mandatory that Axelrod inform the Court of the control and interference by McBride which Axelrod perceived him exercising over Kefalos with respect to Axelrod's representation of her. However, it is at this juncture that Axelrod allowed self-interest to override his loyalty and responsibility to his client.

35. If Axelrod had advised the Court of McBride's control of Kefalos, it would have come to light that McBride was making the filings which Axelrod complained were causing a conflict between he and Kefalos. An affidavit disclosing these facts was presented in this proceeding.

36. The Summary of Psychologist Report of Mark F. Markiewicx presented herein confirms that Kefalos was susceptible to the type of control exercised by McBride. As stated in her affidavit, Kefalos

came under the control of McBride subsequent to the psychological evaluation ordered by the Court.

37. Perhaps most telling is Axelrod's statement about the memos after his recantation on May 20, 2002, during the McBride trial (McBride Tr., p. 294):

> A. Now, I was merely – this research was prepared just to see if there was any alternative to participating in that sort of charade over and over and over and over again. But this was prepared because I thought if I couldn't convince Judge Marbley that this was going to end, he wasn't going to let me out of the case and I wanted to get out of the case. She wouldn't talk to me, and she was filing bogus financial claims against me. And I wanted to get out of the case, and that's what this memo was there for.[4]
>
> Q. So, this was not – it didn't have anything at all to do with Katina Kefalos' best interests, did it? It had to do with your best interests?
>
> A. I said I wanted to get out of the case. This was part of my effort to get out of the case.

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[4] Axelrod fails to mention that he suspected the reason she would not talk to him and the reason bogus financial claims were being filed against him was because of McBride's dominance.

38. In the Statement of David F. Axelrod Regarding James Thomas McBride he stated:

> . . . I believe that, had Kefalos allowed a competent attorney to provide a legitimate defense, there was some possibility of an acquittal, and there was a probability of a much more lenient sentence in the event of conviction.

39. The Affidavit of Alan Pfeuffer and the Affidavit of Katina Kefalos filed in the malpractice case and provided to Judge Marbley in this habeas corpus proceeding point out that once Kefalos was extricated from the control of McBride she became a compliant client.

40. The lucidity of Kefalos' defense prior to being controlled by McBride is illustrated by her letter of April 13, 2000, to Assistant United States Attorney, Dan Brown, which is in the record of this proceeding and her recorded conversation with Axelrod which is lodged with the district clerk.

41. The Sixth Circuit erroneously states at A-1 that Kefalos argues that stand-by counsel, Mr. Pfeuffer, participated in the conspiracy.

REASONS FOR GRANTING THE WRIT

The decision of the Sixth Circuit denying Kefalos a certificate of appealability is in conflict with decisions of other United States Courts of Appeals and

has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power.

Recently there have been attempts by the executive branch of the federal government to interfere with the sacred right to counsel. Examples are found in the conduct of the Defense Department urging Republican donors not to do business with law firms providing pro bono representation to detainees at the Guatanamo Bay detention center and the conduct of the Department of Justice in inducing KPMG LLP to terminate payments for the defense of certain of its professionals in return for an agreement not to indict KPMG. If indicted and convicted, KPMG would have been forced out of business since, like Arthur Andersen, it is an organization of certified public accountants.

Implicitly, the Sixth Circuit in refusing to grant a certificate of appealability is saying that the conduct alleged and supported by facts presented are insufficient to cast any doubt or difference of opinion among jurists as to the propriety of Judge Marbley's decision denying Kefalos petition for writ of habeas corpus.

Here we have a Federal District Judge agreeing to allow Kefalos' court appointed defense lawyer to withdraw only if he showed the judge how he could force Kefalos to go to trial *pro se*. Then that same Federal District Judge has the audacity to deny Kefalos' petition for writ of habeas corpus when he was clearly disqualified under 28 U.S.C. § 455 because of his personal

knowledge of the facts and personal involvement in the events upon which much of the petition was based.

This case goes to the very heart of the Sixth Amendment's right to counsel. Instead of providing Kefalos with this time-honored right, Axelrod, who wished to withdraw, failed to disclose to Judge Marbley that he believed the conduct upon which he based his motion to withdraw was being imposed upon the will of Kefalos by James McBride. In violation of his judicial oath, Judge Marbley entered into an agreement with Axelrod that he would be allowed to withdraw only if Axelrod showed Judge Marbley how to avoid the necessity of appointing a successor counsel. This is akin to a conspiracy between judge and defense lawyer to convict the defendant which was condemned as unconstitutional and unprivileged in *Tower v. Glover*, 467 U.S. 914 (1984).

Judge Marbley and Axelrod then surprised Kefalos at a status conference during which Judge Marbley proceeded to recite facts and arguments supplied to him by Axelrod upon which his decision that Kefalos had waived her right to counsel was grounded.

At the hearing during which Judge Marbley ruled that Kefalos had waived her right to counsel, Kefalos was represented by Axelrod who failed to rebut Judge Marbley's erroneous recitation of facts with respect to the discharge of her four prior attorneys. Presumably in discharging the four prior attorneys Judge Marbley did so for good cause after a

thorough analysis. It was only at the urging of Axelrod that Judge Marbley indulged a *post hoc* rationalization to aid Axelrod.

Also at that hearing Axelrod failed to advise Judge Marbley of information known to Axelrod that the conduct of Kefalos upon which Judge Marbley based his decisions to hold that Kefalos had waived her right to counsel and to allow Axelrod to withdraw was done under the control of James McBride.

In *Brown v. Sternes*, 304 F.3d 677 (7th Cir. 2002) it was held that attorneys who failed to investigate their client's mental condition provided inadequate representation which required reversal of the client's conviction and sentence.

When the conduct of Judge Marbley and Axelrod was raised by Kefalos as grounds for relief under 28 U.S.C. § 2255, it was Judge Marbley who denied the petition. Under the circumstances, 28 U.S.C. § 455 mandated that he disqualify himself from ruling on the petition. Without considering the disqualification issue which was raised in this appeal, the Sixth Circuit refused to grant a certificate of appealability. Is this an effort to protect its fellow jurist?

How can it be said that the conduct presented here did not rise to a level which would cause fair-minded jurists to question Judge Marbley's conflicted denial of Kefalos' petition for writ of habeas corpus and the denial of her request for a certificate of appealability by a nameless circuit court judge.

This conduct complained of by Kefalos would seem to fall within the type of conduct which this Court noted as structural error requiring automatic reversal. See *Neder v. United States*, 527 U.S. 1, 8 (1999) particularly referencing *Gideon v. Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel) and *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge) and *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial).

In *United States v. Collins*, 430 F.3d 1260, 1266 (10th Cir. 2005) the Court stated:

> Several courts have held that a defendant is denied his Sixth Amendment right to counsel where his attorney fails to test the prosecution's case because counsel slept through portions of the trial. See, *e.g., Burdine v. Johnson*, 262 F.3d 336, 349 (5th Cir. 2001) (en banc; *Tippins v. Walker*, 77 F.3d 682, 687 (2nd Cir. 1996); *Javor v. United States*, 724 F.2d 831, 833 (9th Cir. 1984). In those cases, prejudice is presumed because sleeping counsel cannot confer with the client, object to testimony or perform adequate cross-examinations. *Tippins*, 77 F.3d at 686. Although Mr. L'Esperance was conscious and awake during Mr. Collin's competency hearing, his conduct is akin to the conduct of counsel who sleeps through portions of trial. Mr. L'Esperance declined to present mitigating evidence, which he acknowledged was relevant to the client's competency, because of his pending motion to withdraw. Unable to communicate with his client and awaiting a

> decision on his motion to withdraw, Mr. L'Esperance was not in a position to serve as Mr. Collin's counsel. As a result, Mr. L'Esperance did not engage his legal skills in advocating Mr. Collins' position at his competency hearing.
>
> Mr. L'Esperance's failure to serve as Mr. Collin's advocate is manifest in his repeated declarations that he would "not comment" on his client's competency and in his refusal to present military records and other information that, by both his own and the prosecution's admissions, were relevant to Mr. Collins' competency. Because Mr. L'Esperance stood silent, citing his motion to withdraw, and did not subject the prosecution's case to adversarial testing we hold that Mr. Collins was constructively denied counsel when the District Court entered an order finding Mr. Collins competent without allowing new counsel to revisit the competency issue. Accordingly, Mr. Collins has established a Sixth Amendment violation under *Cronic*, and he need not demonstrate prejudice for Mr. L'Esperance's conduct.

The Court in *Collins* held, as other circuits had previously, that a competency hearing was a portion of the trial at which the defendant is entitled to counsel. Id. at 1264. Likewise, it would follow that a hearing to determine whether a defendant has waived her right to counsel is a proceeding with respect to which reasonable notice must be given, reasonable time to rebut allowed and counsel provided.

In *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991) it was pointed out that the judge "has an obligation to inquire thoroughly into the factual basis of defendant's dissatisfaction." Here, inquiry rather than collusion would likely have exposed the involvement of McBride.

Schell v. Witek, 218 F.3d 1017, 1025 (9th Cir. 2000) pointed out the necessity of a fair hearing on the issue of conflict between defendant and his counsel. The court also pointed out that requiring one who is in irreconcilable conflict with his lawyer to continue to be represented by that lawyer is deprived of the effective assistance of counsel.

As stated in *United States v. Welty*, 674 F.2d 185, 189 (3rd Cir. 1982) "even well-founded suspicions of intentional delay and manipulative tactics can provide no substitute or the inquiries necessary to protect a defendant's constitutional rights."

The surprise hearing at which the agreement between Judge Marbley and Axelrod was carried out was hardly fair or appropriate.

It is respectfully submitted that under the circumstances presented here, contrary to the Sixth Circuit's pronouncement, the district court's decision dismissing Kefalos' petition for relief pursuant to 28 U.S.C. § 2255 is debatable among jurists of reason and is certainly adequate to deserve encouragement to proceed further.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to the United States Court Appeals for the Sixth Circuit.

The Sixth Circuit was presented with substantial questions of denial of the right to counsel in the application for a certificate of appealability. The Court appears to have decided the issue of granting a certificate of appealability on the basis of ineffective assistance of counsel under *Strickland* rather than denial of counsel under *Cronic*. This is in conflict with *United States v. Collins* 430 F.3d 1260 (10th Cir. 2005).

Here there was a complete absence of adversarial testing with respect to the waiver issue and a complete failure by Axelrod to present information to the Court regarding the conduct of Kefalos being the result of control by McBride.

Here, worse than the defense lawyer's silence in *Collins,* was the secret advocacy of Axelrod and complicity of Judge Marbley to force a potentially incompetent person to go to trial *pro se*. In *Collins*, defense counsel failed to present evidence of incompetence for a perceived ethical reason. Here, Axelrod not only failed to rebut, but induced, supported and encouraged a finding by Judge Marbley that Kefalos was being obstreperous with respect to her court appointed counsel when the true facts would have shown otherwise. Additive to that misconduct, Axelrod failed to present evidence of Kefalos' incompetence by virtue of

McBride's control for the selfish reason that he wanted out of a representation which had become uncomfortable and complex. It was the control by McBride which made the representation complex and uncomfortable.

Contrary to the statement by the Sixth Circuit that Judge Marbley's decision is not debatable amongst jurists of reason, it would be a sad day if the facts presented here do not cause a substantial number of jurists to believe that a substantial constitutional right may have been violated and that further inquiry should be had.

How can any credence be given to Judge Marbley's decision when he was statutorily disqualified from rendering it? Hopefully jurists of reason would agree that it can not.

Respectfully submitted,

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No. 06-4135/07-3113

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KATINA KEFALOS,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellees.

(Filed Jul. 3, 2007)

Katina Kefalos, proceeding pro se, appeals a district court judgment denying her motion to vacate her sentence filed under 28 U.S.C. § 2255. Kefalos has filed an application for a certificate of appealability under Fed. R. App. P. 22(b).

In December 2001, a jury convicted Kefalos of tax evasion in violation of 26 U.S.C. § 7201. The district court sentenced her to twenty-seven months of imprisonment. A panel of this court affirmed Kefalos's conviction and sentence. *United States v. Kefalos*, 56 F. App'x 248 (6th Cir. 2003).

In 2004, Kefalos filed her § 2255 motion, essentially arguing that: 1) the government improperly withheld *Brady* material; 2) stand-by counsel, the district court judge, and the prosecutor conspired to deny her the right to the assistance of counsel; and 3) stand-by counsel rendered ineffective assistance in numerous respects. Upon review, a magistrate judge

filed a report recommending that the district court deny the motion as without merit. Over Kefalos's objections, the district court adopted the magistrate judge's recommendation and denied the § 2255 motion.

Upon consideration, Kefalos is not entitled to a certificate of appealability because the district court's decision is not debatable amongst jurists of reason. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Accordingly, the application for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

KATINA KEFALOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

JUDGE MARBLEY
Magistrate Judge KEMP
Case No. 2:04-cv-169
Crim. No. 2:00-cr-114

(Filed July 18, 2005)

OPINION AND ORDER

On December 20, 2004, the Magistrate Judge issued a *Report and Recommendation* recommending that petitioner's motion to vacate, set aside, or correct her sentence pursuant to 28 U.S.C. §2255 be dismissed. On January 27, 2005, petitioner filed objections to the *Report and Recommendation*. Petitioner has also filed a motion to amend her objections. Doc. No. 138. Petitioner objects to all of the Magistrate Judge's conclusions.

In claim one, petitioner asserts that the government failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner previously failed to provide any specificity regarding this claim. Petitioner now alleges, however, that Peggy Nypaver, a tax revenue agent, told probation officer Phelps Jones that petitioner paid all of the taxes she owed in 1986. Petitioner also now alleges that Wendy Brown, petitioner's probation officer, told

petitioner that the IRS had no interest in collecting taxes she owed for 1986.

In claims two through four, petitioner asserts that she was denied her right to counsel when the Court permitted attorney Axelrod to withdraw; she asserts that Axelrod, the government, and the Court conspired to deprive her of her right to counsel; and she asserts that she was denied the effective assistance of counsel when Axelrod failed to raise the issue of petitioner's competency, and because counsel failed to properly represent her interests or investigate the charges against her. In support of these allegations, petitioner now attaches numerous documents including, *inter alia*, a memorandum opposing summary judgment filed in *Kefalos v. Axelrod and Voyrs, Sater, Seymour & Pease, LLP*, Case No. 2:03-cv-180 (S.D. Ohio, Eastern Division) (Exhibit AA to Objections); portions of the trial transcript in *United States v. McBride*, Case No. 2:02-cr-060 (S.D. Ohio, Eastern Division) (Exhibit E to Objections); a transcript of the November 8, 2001, hearing on trial counsel's motion to withdraw (Exhibit F to Objections); portions of transcripts from depositions of Thomas Howard Fusonie, Charles Waterman, and David Axelrod (presumably conducted in relation to *Kefalos v. Axelrod, supra*) (*see* Exhibits H, I, J, and O to Objections); a statement purportedly made by attorney David Axelrod regarding James Thomas McBride

(Exhibit K to Objections)[1]; a summary of petitioner's December 28, 2004, psychological report (Exhibit M to Objections)[2]; an April 13, 2000, letter from petitioner

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[1] The "Statement of David F. Axelrod Regarding James Thomas McBride" indicates in relevant part as follows:

> I first came into contact with McBride during my representation of Katina Kefalos. I did not know his name at the time, but he was present for most or all court proceedings. During this period Kefalos was refusing to communicate with me in any substantive way, to her detriment. Several times, I attempted to speak with her outside the courtroom, and McBride physically interfered by (with another person whom I believe also to be a tax protestor) creating a physical screen between Kefalos and me.
>
> I believe that McBride contributed significantly to the substantial prison sentence received by Kefalos. Kefalos steadfastly refused all my attempts to help her, refusing to speak with me and returning all written communication with the notation "accepted and returned for value and settlement," or words to that effect. I believe (but do not know) that she was acting at McBride's direction or under his influence. I understand that on at least one occasion, and perhaps more, McBride answered the door at Kefalos's house when I had documents delivered by messenger. I also know that he made tax protestor-type statements to me outside Judge Marbley's courtroom that were consistent with my belief that Kefalos acted in his direction. I believe that, had Kefalos allowed a competent attorney to provide a legitimate defense, there was some possibility of an acquittal, and there was a probability of a much more lenient sentence in the event of conviction.

Exhibit K to Objections.

[2] The "Summary Psychological Report" by Marc F. Markiewicz, a licensed psychologist, is dated December 28, 2004,

(Continued on following page)

to Daniel Brown, Assistant U.S. Attorney, regarding the charges against petitioner (Exhibit N to Objections); and a Declaration of David F. Axelrod, Esq. (Exhibit P to Objections). Petitioner has also now attached in support of her claims an affidavit from Alan J. Pfeuffer, dated January 7, 2005, which indicates in relevant part as follows:

> 1. I am an Assistant Federal Public Defender for the United States District Court for the Southern District of Ohio. In that capacity, I was appointed as stand-by counsel for Katina Kefalos in connection with her trial on charges of attempted evasion of the payment of federal taxes.
>
> 2. After her conviction and after I was able to communicate with her outside the presence of James T. McBride ("McBride"), she began to respond to my efforts to represent her on appeal.
>
> * * *

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and indicates that Markiewicz diagnosed petitioner on December 31, 2004, with "Major Depressive Disorder with PTSD features" and "Anxiety Disorder." Exhibit M to Return of Writ. Markiewicz saw petitioner on a weekly basis from December 31, 2003, to December 28, 2004. Markiewicz states:

> It is important to note that Katina's fragile ego and negative self-concept has left her vulnerable and predisposed to being manipulated by designing others especially males. Her good relationship with her father as opposed to her poor relationship with her mother has been a factor in this pronounced tendency.

Id.

> 5. No issue was presented to the Sixth Circuit regarding failure of Axelrod to bring McBride's control over Katina Kefalos to the attention of the Court.
>
> 6. It is apparent that Axelrod knew of McBride's control over Kefalos as is evidenced by the statement of David F. Axelrod regarding James Thomas McBride. . . .
>
> 7. In my opinion, as an attorney who regularly defends defendants in Federal criminal cases, it was below the standard of care for Axelrod not to bring the issue of McBride's control over Kefalos to the attention of the Court rather than move to withdraw. . . . He should have insisted that the Court investigate whether McBride was behind the attacks on him which served as a basis for his request to withdraw. . . . [C]ounsel failed to point out in connection with his motion to withdraw that there was a likelihood Kefalos was incompetent because of the control of McBride.

See Exhibit P to Objections. Finally, petitioner has attached her own affidavit, in which she indicates that McBride

> took control of my defense through exertion of mental and emotional control over me. In this regard, McBride prevented me from talking to Axelrod and urged me to make certain UCC filings against Axelrod.
>
> I told McBride that I wanted nothing to do with the filing of UCC forms against Axelrod.

> Despite this, McBride filed the documents. I never filed any of those documents. Some of the documents bore by [sic] signature. However, my signature was affixed to the documents without my consent through the control McBride exercised over me.
>
> After my conviction, my stand-by counsel, Alan Pfeuffer, whom McBride insisted I not consult with, forcefully directed McBride to allow him to speak to me alone. It was at this point that I began to have discussions with Mr. Pfeuffer which finally led me to extricate myself from McBride's control.

See id.

Additionally, petitioner raises all of the same arguments previously raised.

Pursuant to 28 U.S.C. 636(b)(1), this Court has conducted *de novo* review of the *Report and Recommendation*.

This Court has reviewed the entire record, including all of the exhibits submitted in support of petitioner's objections, and in support of petitioner's motion to amend her objections. Nothing therein supports petitioner's allegation that the government improperly failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, *supra*, nor has petitioner provided any reasonable basis for this Court to conclude that support for such allegation exists outside of the record. As noted by the Magistrate Judge, the United States Court of Appeals for the

Sixth Circuit has already rejected petitioner's claim that she was unconstitutionally deprived of the right to counsel. *See United States v. Kefalos*, NO. 02-3396 (6th Cir. Feb. 14, 2003), Doc. #117. This claim, therefore, will not now again be addressed in these federal habeas corpus proceedings. *Oliver v. United States*, 90 F.3d 177, 180 (6th Cir. 1996); *Stephan v. United States*, 496 U.S. 527, 528-29 (6th Cir. 1974). Additionally, the Court remains unpersuaded that petitioner was denied the effective assistance of counsel under the test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), due to her attorney's failure to raise an issue regarding her competency. As noted in the *Report and Recommendation*, on May 10, 2001, petitioner was determined competent to stand trial, and the record is devoid of support for her claim that she thereafter became incompetent prior to November 13, 2001, when attorney Axelrod withdrew as her attorney. To the contrary, in view of the numerous pleadings filed by petitioner, the record demonstrates that she was well aware of the nature of the proceedings against her, and the manner in which to notify the Court of her complaints. Further, the record simply fails to support her claim that she was unable to communicate with Axelrod, or with any of the other attorneys appointed on her behalf. *See* Declaration of David F. Axelrod, Doc. #16; Declaration of David F. Axelrod, Esq., Exhibit P to Objections.

For these reasons, and for the reasons discussed at length in the Magistrate Judge's *Report and Recommendation*, all of petitioner's objections are

OVERRULED. Petitioner's request for an evidentiary hearing is also **DENIED**. No evidentiary hearing is required where the record conclusively shows that petitioner is not entitled to relief. *Fontaine v. United States,* 411 U.S. 213, 215 (1973); *Blanton v. United States*, 94 F.3d 227, 235 (6th Cir. 1996). Such are the circumstances here.

The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

/s/ Algenon L. Marbley
ALGENON L. MARBLEY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

KATINA KEFALOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

JUDGE MARBLEY
Magistrate Judge KEMP
Case No. 2:04-cv-169
Crim. No. 2:00-cr-114

REPORT AND RECOMMENDATION

(Filed December 20, 2004)

Petitioner, a federal prisoner, brings this motion to vacate, set aside, or correct her sentence pursuant to 28 U.S.C. §2255. Petitioner's request for the appointment of counsel (Doc. #127) is **DENIED**. Petitioner's August 23, 2004, unopposed motion to amend the petition (Doc. #131) is **GRANTED**. Petitioner's motion for return of her passport (Doc. #132) is **DENIED**.[1] Petitioner's May 6, 2004, request for an extension of sixty days to respond to the return of writ is **DENIED**, as moot, since such time has already expired.

For the reasons that follow, the Magistrate Judge **RECOMMENDS** that this action be **DISMISSED**.

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[1] This Court is without the authority in a §2255 proceeding to authorize the return of petitioner's passport.

I. PROCEDURAL HISTORY

On July 18, 2000, petitioner was indicted on willful tax evasion, in violation of 26 U.S.C. §7201. Doc. #1. Prior to trial, five different attorneys were appointed on petitioner's behalf; each withdrew prior to trial. *See* Docs. #12, 20, 50, 53, 57, 61, 68, 76, 117. On December 3, 2001, petitioner proceeded to jury trial *pro se*. The public defender was appointed as stand-by counsel, but the record does not reflect that petitioner sought any assistance from the public defender. *See* Docs. 76, 79. On December 4, 2001, petitioner was found guilty, as charged. Doc. #80. She was sentenced to twenty-seven months incarceration and three years supervised release. Doc. #94. Petitioner filed a timely appeal of her convictions and sentence to the United States Court of Appeals for the Sixth Circuit. She asserted that

> the district court violated her Sixth Amendment right to counsel because she did not knowingly and voluntarily waive counsel and express her desire to proceed *pro se*.

United States v. Kefalos, No. 02-3396 (6th Cir. Feb. 14, 2003), Doc. #117. On February 14, 2003, the United States Court of Appeals for the Sixth Circuit affirmed petitioner's convictions and sentence. *Id.* On June 16, 2003, the mandate issued. Doc. #118. On October 20, 2003, the United States Supreme Court denied petitioner's petition for a writ of *certiorari*. Doc. #122.

On March 1, 2004, petitioner filed the instant *pro se* motion to vacate, set aside, or correct her sentence pursuant to 28 U.S.C. §2255. She asserts the following claims:

1. *Brady* violations.

Conviction was obtained by the unconstitutional failure of the prosecution to disclose evidence which proved defendant/movant did not owe taxes for the year 1986.

2. Complete denial of movant's constitutional right to assistance of counsel.

Conspiracy between appointed counsel, David Axelrod, and U.S. District Judge Algenon Marbley and/or his law clerk, Chris Glaros, to deprive movant of her Sixth Amendment right to assistance of counsel.

3. Ineffective assistance of counsel.

Court appointed attorney, David Axelrod, knowingly failed to raise the issue of my competency after being made aware of the adverse effect that James McBride was having on my ability to communicate with, and assist my trial counsel in the preparation and presentation of my case. Axelrod's ineffective assistance of counsel directly resulted in: 1) my having to proceed *pro se*; 2) my advancement of a totally illogical and incompetent trial strategy; 3) my ultimate and certain conviction.

Court appointed attorney David Axelrod failed to inform me: 1) that my November 7, 2001, "status conference" hearing was, in reality, a prearranged hearing designed to ensure his withdrawal as my trial counsel; 2) that he filed a motion to withdraw as trial counsel three (3) minutes before the "status" hearing; and 3) that he had engaged in improper *ex parte* communications with

> Judge Marbley's chambers, essentially providing Judge Marbley with the information and means to force me to proceed *pro se* to trial. Axelrod's ineffective assistance of counsel directly resulted in my having to defend myself at trial, and in my ultimate conviction.
>
> Court appointed attorney David Axelrod failed to adequately investigate my case, in that he: 1) failed to verify alleged tax loss reported by the IRS; 2) failed to adequately examine the psychological impact of James McBride on me; and 3) failed to represent my interests during the November 7,2001, "status" hearing. As a direct result of Axelrod's ineffective assistance of counsel I was convicted and sentenced to prison.

It is the position of the respondent that these claims are without merit. On August 23, 2004, petitioner filed a motion to amend the petition, which motion was granted, to include the following additional claim:

> 4. Ineffective assistance of counsel. My court appointed attorney, David Axelrod, was allowed to withdraw as my counsel at the conclusion of the hearing at which the Court held I had waived my right to appointed counsel. During that hearing, I was entitled to the effective assistance of counsel to present on my behalf my right to appointed counsel and facts to support a conclusion that I had not waived my right to assistance of counsel. David Axelrod not only failed to advocate that position, but advocated to the contrary. Consequently, I was without counsel in a proceeding

> during which it was held that I had waived my right to counsel.

III. CLAIM ONE

In claim one, petitioner asserts that the government failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), by concealing evidence that would establish that petitioner owed no taxes for 1986. Petitioner fails to provide any further specificity regarding these allegations. She fails to explain the nature of the evidence she refers to, and its nature is not apparent from review of the record before this Court. Further, petitioner's allegations in claim one are without support, and review of the record does not provide any reasonable basis to conclude that any evidence outside of the record would support petitioner's claim.

Claim one is without merit.

IV. CLAIM TWO

In claim two, petitioner asserts that she was denied her right to counsel. She also asserts that attorney Axelrod, the government, and the Court all conspired against her to deny her the right to counsel.

Petitioner's claim that she was unconstitutionally denied the assistance of counsel has already been rejected on direct appeal:

> In her timely appeal, Kefalso argues that the district court violated her Sixth Amendment right to

counsel because she did not knowingly and voluntarily waive counsel and express her desire to proceed *pro se*.

While Kefalos's case was proceeding to trial, five different appointed attorneys successfully moved to withdraw, citing various conflicts. From a review of the trial record, it is apparent that these conflicts all had their genesis in Kefalos's intent to champion hackneyed and frivolous tax-protestor defenses at trial, her outright refusal to participate in her defense, or her belief that none of the appointed attorneys understood the tax code with the matchless insights she possesses.

A criminal defendant must knowingly and voluntarily waive the benefits associated with the right to counsel before being allowed to represent herself. *Farreta v. California*, 422 U.S. 806, 835 (1975). Before finding that a defendant has knowingly and voluntarily waived counsel, however, a trial court must inform her of the "dangers and disadvantages of self-representation, so that the record will establish that '[s]he knows what [s]he is doing and [h]er choice is made with eyes open.'" *Id.* (quoting *Adams v. United States*, 317 U.S. 269, 279 (1942).

Upon review, we conclude that Kefalos made her choice with her eyes open. The district court painstakingly assured that Kefalos understood the dangers of proceeding *pro se*. *See United States v. McDowell*, 814 F.2d 245, 260 (6th Cir. 1987). Although Kefalos refused to express orally her desire to proceed *pro se*, it is clear from the record that Kefalso sought to halt the judicial

> process by simultaneously refusing appointed counsel and declining self-representation. A defendant's refusal to accept one of those options does not create a safe haven from criminal proceedings. Rather, after informing a defendant of the dangers of self-representation, the court can treat a subsequent refusal to accept appointed counsel as the functional equivalent of a knowing and voluntary waiver of counsel. *United States v. Grosshams*, 821 F.2d 1247, 1252 (6th Cir. 1987).
>
> For these reasons, the district court's judgment is affirmed.

United States v. Kefalos, No. 02-3396 (6th Cir. Feb. 14, 2003), Doc. #117. This Court therefore will not now again consider such allegations in this §2255 proceeding. *See Stephen v. United States*, 496 U.S. 527, 528-29 (6th Cir. 1974); *Oliver v. United States*, 90 F.3d 177, 180 (6th Cir. 1996).

Claim two is without merit.

V. CLAIM THREE

In claim three, petitioner asserts that she was denied the effective assistance of counsel because attorney Axelrod failed to raise the issue of her competency prior to trial after he learned that James McBride was interfering with her ability to communicate with counsel. She also asserts that Axelrod forced her to proceed *pro se*. These allegations are spurious.

The right to counsel guaranteed by the Sixth Amendment is the right to the effective assistance of counsel.

McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). The standard for reviewing a claim of ineffective assistance of counsel is twofold:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also Blackburn v. Foltz*, 828 F.2d 1177 (6th Cir. 1987). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, at 689.

To establish prejudice, it must be shown that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Strickland*, at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because petitioner must satisfy both prongs of the *Strickland* test to demonstrate ineffective assistance, if the Court determines that petitioner has failed to satisfy one prong, it need not consider the other. *Id.* at 697.

Petitioner has failed to meet this standard here. On May 10, 2001, petitioner was determined competent to stand trial. Doc. #52. The record fails to provide any indication that petitioner thereafter became incompetent between May 2001 and November 13,2001, when Axelrod withdrew as defense counsel. To the contrary, the record shows that petitoner was well aware of the nature of the proceedings against her, and filed numerous pleadings on her own behalf. See, e.g. Docs. #51, 58, 59, 66, 73. Further, the record indicates that during the three months that Axelrod represented petitioner, she refused to communicate with him. *See Declaration of David F. Axelrod*, Doc. #116. Thus, Axelrod would not have been unreasonable in remaining unaware of any mental health issues, or of the need to request a competency hearing, had there been such a necessity, under *Strickland*. Nothing in the record indicates that anyone interfered with petitioner's ability to communicate with Axelrod or with any of the attorneys appointed to represent petitoner. As noted by the United States Court of Appeals for the Sixth Circuit:

> [I]t is clear from the record that Kefalos sought to halt the judicial process by simultaneously refusing appointed counsel and declining self-representation.

See United States v. Kefalos, *supra*, Doc. #117. Additionally, petitioner filed a fraudulent UCC Form 1 with the Secretary of State of the State of Ohio against petitioner and his law firm which ultimately required Axelrod to withdraw as defense counsel. *Declaration of David F. Axelrod*, Doc. #116.

Petitioner also asserts that she was denied the effective assistance of counsel because Axelrod failed to investigate the charges against her, failed to examine James McBride's psychological impact on her, and failed to represent her interests on November 8, 2001, when the Court granted Axelrod's request to withdraw as defense counsel.

Petitioner has failed to establish the ineffective assistance of counsel under the test set forth in *Strickland* based upon any of the foregoing. Petitioner cannot establish prejudice under Strickland from any of the foregoing, since Axelrod did not represent petitoner at trial, and the United States Court of Appeals for the Sixth Circuit has concluded that petitoner, by her own actions, waived her right to counsel.

Claim three is without merit.

VI. CLAIM FOUR

In claim four, petitioner asserts that she was denied the effective assistance of counsel on November 8, 2001, when the Court permitted attorney Axelrod to withdraw. Petitioner argues that Axelrod should have argued that petitoner had not waived her right to counsel instead of seeking to withdraw. Again, the United States Court of Appeals for the Sixth Circuit has already rejected petitioner's claim that her right to the effective assistance of counsel was violated when this Court permitted Axelrod to withdraw and petitoner thereafter proceeded *pro se*. This Court will not now again consider such claim here. *Stephan v. United States*, *supra*; *Oliver v. United States*, *supra*.

VII.

In view of all of the foregoing, the Magistrate Judge **RECOMMENDS** that this action be **DISMISSED**.

If any party objects to this *Report and Recommendation*, that party may, within ten (10) days of the date of this report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. §636(b)(1).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to have the district judge review the *Report and Recommendation de novo*, and also operates as a waiver of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

/s/ Terence P. Kemp
United States Magistrate
Judge

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(2)

No. 07-429

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

KATINA KEFALOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR REHEARING OF ORDER DENYING PETITION

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GROUNDS FOR REHEARING

On November 5, 2007, this Court denied the Petition for Writ of Certiorari filed herein by Katina Kefalos. On that same date this Court granted certiorari in *Arave v. Hoffman*, No. 07-110.

The Kefalos case provides an excellent companion case to Arave:

(a) Hoffman did not receive effective assistance of counsel in the plea bargain phase of pretrial proceedings. Its effect was evaluated under *Strickland v. Washington*, 466 U.S. 668 (1984).

(b) Kefalos was denied counsel in pretrial proceedings which led to a finding she had waived her right to counsel by a course of conduct. This presents two related questions:

> (1) Should Kefalos have been provided counsel to assist her in controverting assertions of a course of conduct justifying a finding of waiver of the right to counsel? And if so,
>
> (2) Should the denial of counsel be evaluated under *Strickland v. Washington*, supra, or *United States v. Cronic*, 466 U.S. 648 (1984) and *Neder v. United States*, 527 U.S. 1 (1963), i.e., prejudice shown v. prejudice presumed.

In effect, Kefalos was denied the assistance of counsel during the proceeding in which the district court determined she had waived the right to counsel by her conduct.

Hoffman rejected a plea bargain because of the negligent advice of his attorney, which conduct was deemed to be ineffective assistance of counsel.

Kefalos was denied counsel because her attorney had a conflict of interest and presented no defense to assertions of waiver. To the contrary counsel for Kefalos encouraged a finding of waiver because he knew he would only be allowed to withdraw if a waiver was found.

Hoffman was convicted after a fair trial in which he was represented by a competent attorney.

Kefalos was convicted after a trial in which she incompetently represented herself.

Unlike Hoffman, at no stage in the proceedings has Kefalos been given a hearing on this issue which is critical to right to counsel jurisprudence. Her writ of habeas corpus was denied by a district judge who was unquestionably disqualified from hearing the matter. The Court of Appeals refused to grant her a certificate of appealability.

WHEREFORE, it is respectfully requested that this Honorable Court reconsider its denial of Kefalos' petition for writ of certiorari. Upon reconsideration, this Honorable Court is urged to take the Kefalos case along with the Arave case in order to add to and

clarify the jurisprudence of the right to counsel in pretrial proceedings.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH

I hereby certify that this petition for rehearing is restricted to the grounds set forth in Rule 44.2 of the Supreme Court Rules in that the grant of certiorari in *Arave v. Hoffman*, No. 07-110 constitutes intervening circumstances of a substantial or controlling effect and is presented in good faith and not for the purpose of delay. In *Arave*, though not raised in the petition, this Court requested briefs regarding whether Hoffman's conviction in a fair trial should have any effect on his remedy. This facet brings into play the relative application of *Strickland v. Washington*, 466 U.S. 668 (1984), *United States v. Cronic*, 466 U.S. 668 (1984) and *Neder v. United States*, 527 U.S. 1 (1963).

Brice A. Tondre